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bcc

Subject Richardson Flat - past costs decrees - draft motion to
enter

The 30-day public comment period on the past cost decrees has expired without comments. I have prepared a draft motion to enter the decrees, along with a proposed order, which are attached. You have already agreed not to oppose entry of the decrees. But please let me know if you have an objection to the form of the motion or proposed order. If I do not hear from you by the end of the day Wednesday, October 18 I will assume that you do not have any objections.

Thanks,

Mark

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**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

UNITED PARK CITY MINES COMPANY,
ATLANTIC RICHFIELD COMPANY,
FALCONBRIDGE LIMITED, and
NORANDA MINING INC.,

Defendants.

Case No. 2:06CV00745 PGC

**UNOPPOSED MOTION TO ENTER
UNCHALLENGED CONSENT
DECREEES**

The United States of America, on behalf of the United States Environmental Protection Agency, respectfully moves this Court to sign and enter two proposed Consent Decrees: (1) the

proposed Partial Consent Decree between the United States and Defendants Falconbridge Limited (“Falconbridge”) and Noranda Mining Inc. (“Noranda”), and (2) the proposed Consent Decree between the United States and Defendants United Park City Mines Company (“UPCM”) and the Atlantic Richfield Company (“Arco”). The United States sets forth the following in support of this motion:

1. The United States filed a complaint in this matter pursuant to Section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (“CERCLA”), 42 U.S.C. § 9607(a), for reimbursement of response costs incurred by the United States in connection with the Richardson Flat Tailings site in Park City, Utah (“Site”) (docket no. 1).

2. On September 5, 2006, the United States lodged with the Court a proposed Partial Consent Decree proposing to settle the United States’ claim for past response costs against Falconbridge and Noranda (docket no. 2).

3. On September 5, 2006, the United States lodged with the Court a proposed Consent Decree proposing to settle the United States’ claim for past response costs against UPCM and Arco (docket no. 3).

4. Entry of these proposed Decrees by the Court will resolve the United States’ pending action regarding the Site against all defendants. In addition, the proposed Decrees are intended to provide protection to UPCM, Arco, Falconbridge, and Noranda against contribution actions or claims, as provided by Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2), for the matters addressed by the respective Decrees.

5. Pursuant to 28 C.F.R. § 50.7, and as provided in the proposed Partial Consent Decree, on September 13, 2006, the United States published notice of the proposed Partial Consent Decree with Falconbridge and Noranda in the Federal Register and solicited public comments for thirty days. See 71 Fed. Reg. 54093 (2006). The public comment period has expired and no comments have been received.

6. Pursuant to 28 C.F.R. § 50.7, and as provided in the proposed Consent Decree, on September 13, 2006, the United States published notice of the proposed Consent Decree with UPCM and Arco in the Federal Register and solicited public comments for thirty days. See 71 Fed. Reg. 54093 (2006). The public comment period has expired and no comments have been received.

7. Entry of a consent decree is entrusted to the informed discretion of the trial court. That discretion should be exercised in light of Congress' clearly stated policy in favor of settlements in CERCLA actions. See 42 U.S.C. § 9622; United States v. SEPTA, 235 F.3d 817, 822 (3d Cir. 2000) (approval of a consent decree in CERCLA litigation should be informed by the deference owed to "EPA's expertise and to the law's policy of encouraging settlement . . ."). See also United States v. Cannons Eng'g Corp., 899 F.2d 79, 84-85 (1st Cir. 1990) (policy of the law to encourage settlements "has particular force where . . . a government actor committed to the protection of the public interest has pulled the laboring oar in constructing the proposed settlement"). When reviewing a proposed consent decree, a court should balance its discretion with appropriate deference toward "(t)he efforts of the EPA and the Justice Department, experts in the field of environmental recovery, and their determination that the proposed decree is in the

public interest” United States v. Nat’l R.R. Passenger Corp., No. CIV. A. 86-1094, 1999 WL 199659, at *7 (E.D. Pa. April 6, 1999), aff’d sub nom. United States v. SEPTA, 235 F.3d 817 (3d Cir. 2000). See also United States v. Union Elec. Co., 132 F.3d 422, 430 (8th Cir. 1997).

8. Consent decrees should be evaluated for both their procedural and substantive fairness. See Union Elec., 132 F.3d at 430. “Procedural fairness requires that the parties to the decree conduct their negotiations forthrightly to achieve a bargained-for resolution to the suit.” Nat’l R.R. Passenger Corp., 1999 WL 199659 at *7 (quoting United States v. Atlas Minerals and Chem., Inc., 851 F. Supp. 639, 653 (E.D. Pa. 1994)). Procedural fairness also requires that the parties to a Consent Decree must have negotiated at arm’s length. Nat’l R.R. Passenger Corp., at *9; United States v. Kramer, 19 F.Supp. 2d 273, 283-84 (D.N.J. 1998); Cannons, 899 F.2d at 87. Substantive fairness contemplates the fairness of the result and requires that a Consent Decree’s terms correlate with a reasonably acceptable measure of fault and apportionment of liability. Nat’l R.R. Passenger Corp., 1999 WL 199659, at *9. EPA’s chosen measures of fault and apportionment should be upheld unless they are arbitrary and capricious and lack a rational basis. Id. (citing Cannons, 899 F.2d at 87). “A court should approve a proposed consent decree if it is fair, reasonable, and consistent with CERCLA’s goals.” SEPTA, 235 F.3d at 823. See also Cannons, 899 F.2d at 85 (“[W]hen such consent decrees are forged, the trial court’s review function is only to ‘satisfy itself that the settlement is reasonable, fair, and consistent with the purposes that CERCLA is intended to serve.’” (quoting H.R. Rep. No. 253, Pt. 3, 99th Cong., 1st Sess. 19 (1985))).

9. The Consent Decrees in this case are substantively fair and were negotiated in a

procedurally fair manner. The terms of the Consent Decrees are reasonable, fair, and consistent with the purposes of CERCLA. They will compensate the United States for a significant percentage of its past response costs at the Site. In exchange, the United States has given the Defendants covenants not to sue.

10. Finally, both Consent Decrees were fairly negotiated at arm's length by experienced counsel, and the parties had an opportunity to participate in the negotiations. See Cannons, 899 F.2d at 87; Kramer, 19 F.Supp. 2d at 283-84. Moreover, the Consent Decrees were approved after having been reviewed for appropriateness by several levels of managers within the United States Department of Justice.

11. The United States has provided each Defendant with notice of its intent to seek entry of these Decrees. None of the Defendants has expressed any objection to either the relief sought herein or to the form of the proposed order.

For the above reasons, the United States respectfully requests that the Court sign both proposed Consent Decrees (a signature block for the Court's execution is contained on page 11 of the proposed Partial Consent Decree with Falconbridge and Noranda and on page 12 of the proposed Consent Decree with UPCM and Arco) and enter the accompanying Order.

Respectfully submitted,

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